Filed 3/30/10 P. v. Curry CA4/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DESEAN CURRY, Defendant and Appellant.	A122104 (Contra Costa County Super. Ct. No. 50609651)

I.

INTRODUCTION

Appellant Anthony DeSean Curry was convicted by jury of attempted murder (Pen. Code, § 187, 664)[1] and battery with serious bodily injury (§ 243, subd. (d)). The following enhancements were found true by the jury: personal infliction of great bodily injury (§ 12022.7, subd. (a)); personal use of a firearm in the commission of the attempted murder (§ 12022.5, subd. (a)(1)) and personal use or discharge of a firearm causing great bodily injury (§§ 12022.53, subds. (b),(c) & (d)). On appeal, appellant claims (1) the court abused its discretion by admitting evidence of an attempted carjacking and shooting; (2) he was denied the effective assistance of counsel; and (3) the court abused its discretion by imposing a restitution fine of $46,000. We reject these arguments and affirm the judgment.

[1] All statutory references are to the Penal Code.

II.

FACTS AND PROCEDURAL HISTORY

Appellant's convictions stem from the 1999 shooting of Synada Browning, appellant's 19-year-old girlfriend.[2] Synada was found barely alive in a remote truck stop in Richmond during the early morning hours of August 19, 1999. She had suffered a single gunshot wound to the left temple, exiting through her right eye, which was destroyed. The bullet traveled through her head, causing permanent debilitating injuries, including major facial disfiguration, partial paralysis, and permanent blindness. Synada has no memory of the circumstances surrounding the shooting.

Appellant's father testified at trial under subpoena. On August 20, 1999, he noticed that appellant had possession of Synada's vehicle and her cellular phone but he had not seen her. When questioned by his father, appellant claimed that he did not know Synada's whereabouts and explained that she may have gone camping with her parents. Appellant's father called Synada, leaving her a voice mail saying appellant was looking for her and to call him, ending with "You better be OK or I'm gonna be pissed off."

On approximately August 22, 1999, appellant's father warned him that if anything had happened to Synada, and appellant was found in her car, he would be arrested "whether he had anything to do with her or not." Shortly thereafter, appellant abandoned Synada's vehicle in San Mateo and carjacked a 1996 silver Mercedes Benz at gunpoint. Synada's missing Honda was found at the scene of the carjacking. At that point, appellant became a suspect in the shooting.

Several days later, on August 25, 1999, appellant was involved in an attempted carjacking of a black Suburban in San Francisco. The driver stepped on the gas and fled

[2] There was a nine-year delay between the commission of the crime and appellant standing trial. Appellant has been in continuous custody since his arrest on August 25, 1999. However, he faced charges in numerous jurisdictions (Contra Costa, Alameda, San Francisco and San Mateo counties) for criminal acts that took place between August 19 and August 25, 1999. He was finally transported to Contra Costa County on May 3, 2005, to face trial on these charges.

the area. As he was fleeing, appellant's gun discharged, striking the car. The driver of the black Suburban picked appellant's picture from a photographic lineup.

Appellant was apprehended later that same day after a lengthy, highly dangerous vehicle pursuit with police that ended in Oakland with appellant's vehicle being stopped by 20 marked police vehicles. One of the pursuing officers testified that in his estimation, appellant drove through approximately 50 red lights and an equal number of stop signs before he was apprehended. During the chase, appellant threw a fully loaded assault rifle out the window. When appellant was arrested, he was wearing a bulletproof vest.

After being taken into custody, appellant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and gave three conflicting versions of the events in question. Each of these interviews was tape recorded and edited versions were played for the jury at trial.

Appellant first told police that before she went missing, he dropped Synada off at a nightclub. He did not want to go inside because he was having "issues with people." He denied having any knowledge of her whereabouts. During this interview, he admitted that he carjacked the silver Mercedes in San Mateo. He told the officer about the conversation with his father, who warned him that it would look suspicious if his girlfriend was missing, and she turned up dead and he had her car. He also admitted attempting to carjack the black Suburban. When the car sped off, he claimed he accidentally fired a shot at it. He also acknowledged that he used Synada's ATM card to buy an outfit at the Gap after she was missing.

Appellant gave another statement to police on the following day, August 26, 1999, after one of appellant's relatives had learned that Synada survived the gunshot wound. In this interview, appellant claimed that Synada suffered the gunshot wound when they were driving in her car on a freeway in downtown San Francisco at around 2:00 a.m. He explained that he had a loaded gun in the car, it started to fall, and when Synada grabbed the gun, it accidentally discharged, striking her in the head. He admitted to leaving Synada where she was eventually found in Richmond.

Appellant was interviewed for a third time on August 27, 1999. Appellant was confronted with evidence demonstrating that Synada could not have been shot inside the car, as appellant claimed.[3] Appellant then changed his story and said that Synada suffered her injuries when his gun accidentally discharged at Ocean Beach in San Francisco. Appellant claimed that they were standing by Synada's car, kissing each other. Appellant had a loaded gun on a chain around his neck. Appellant grabbed the gun to move it, but it went off, accidentally injuring Synada. Thinking Synada was dead, appellant transported her body to Richmond and left her at a desolate location.

On April 22, 2008, appellant was convicted by jury of attempted murder and the lesser included offense of battery with great bodily injury. All the enhancement allegations were found to be true. On June 27, 2008, appellant was sentenced to state prison for a total term of 34 years to life. Among other orders made at sentencing, appellant was ordered to pay restitution in the amount of $46,000, with the amount to be paid to the Victim Compensation Board. This appeal followed.

III.

DISCUSSION

A. Admissibility of Evidence of Attempted Carjacking

Appellant contends that evidence of the attempted carjacking in San Francisco was inadmissible character evidence, and therefore, should have been excluded under subdivision (a) of Evidence Code section 1101. He also claims that the evidence was far more prejudicial than probative and thus was inadmissible under Evidence Code section 352 as well. We review the trial court's determination to admit the evidence under the abuse of discretion standard. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1021.)

Over appellant's objection, the jury heard evidence that on August 25, 1999, appellant fired a shot at a black Suburban during an attempted carjacking in San

[3] When Synada's 1997 Honda Civic was examined by police technicians, there were no bullets, bullet fragments, bullet holes, or any other evidence of a gunshot inside the vehicle. Additionally, there was no evidence of blood anywhere inside the vehicle.

Francisco's Lakeview District. The jury also learned that during appellant's first interview with the police, he admitted that he attempted to carjack the black Suburban. However, appellant claimed that the gun accidentally discharged when the car sped off.

The jury was instructed that if they found the incident with the black Suburban occurred, they "may but are not required to consider that evidence with the limited purpose of deciding whether or not the defendant's alleged actions [in the charged crimes] were the result of mistake or accident." The jury was further instructed that they were not to "conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

"Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) However, subdivision (c) of section 1101 states that "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

"It is settled that when a defendant uses the same excuse to explain his conduct on more than one occasion his prior statements are admissible to prove his present explanation is fabricated. [Citation.]" (*People v. Moody* (1976) 59 Cal.App.3d 357, 361.) In *People v. Millwee* (1998) 18 Cal.4th 96 (*Millwee*), the California Supreme Court upheld the admission of other crimes evidence under circumstances similar to those before us. In *Millwee,* the defendant killed his mother by shooting her in the head. The defendant testified the shooting was an accident. He said he had retrieved the gun from a closet intending to sell it, but it had fired accidentally. (*Id.* at p. 111.) After the defense rested, the prosecutor was permitted to present rebuttal evidence that defendant had shot a man two days later in San Diego, and that he had offered a similar explanation. (*Id.* at p. 129.)

In finding the rebuttal evidence admissible, the court reasoned, in part, that the evidence was admitted for the narrow "purpose of showing the implausibility and untruthfulness of defendant's testimony" pursuant to Evidence Code section 1101,

subdivision (c). (*Millwee, supra,* 18 Cal.4th at p. 131.) The court explained that, "defendant sought to avoid responsibility for both shootings by offering the same innocent explanation in each case. . . . The jury could readily find that defendant's credibility in the present case was diminished by the fact that he offered the same explanation for another shooting that occurred only 48 hours later. In light of the foregoing, the evidence was not subject to exclusion under Evidence Code section 1101." (*Ibid.*)

The court also rejected the defendant's claim that the evidence should have been excluded under Evidence Code section 352 in part because the trial court "could properly conclude that the San Diego transcript was highly probative on the limited credibility issue for which it was offered, that defendant's credibility was a crucial issue at trial, and that the potential for undue prejudice was slight under the circumstances." (*Millwee, supra,* 18 Cal.4th at p. 131.)

Appellant contends the court erred in admitting evidence that he claimed he fired the gun accidentally during the attempted carjacking to prove the "absence of mistake or accident" in the charged shooting because "the conduct was not exactly the same in both instances." (Evid. Code, § 1101, subd. (b).) However, the degree of similarity required between the uncharged act and the charged offense, differs depending on what is sought to be proved. (*Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) "To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent. [Citations.]" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

In the present case, we are not concerned with proof of identity or common design or plan. Instead, we are concerned with appellant's state of mind at the time of the shooting, a state which embraces intent, premeditation, motive, absence of accident, and the like. In this regard, "[t]he least degree of similarity . . . is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other

innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402.) In this case, the "[e]vidence of uncharged conduct . . . , while certainly not similar enough to prove identity (an element not at issue), was similar enough to negate a claim of accident and thus prove the element of intent . . . ." (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1381.)

As in *Millwee,* we conclude the trial court did not abuse its discretion by permitting the prosecutor to use the attempted carjacking of the black Suburban because appellant's "credibility in the present case was diminished by the fact that he offered the same explanation for another shooting that occurred only 48 hours [after the charged crimes]." (*Millwee*, *supra*, 18 Cal.4th at p. 131.) We also similarly reject appellant's claim that the admission of the evidence regarding the black Suburban incident violated Evidence Code section 352. The black Suburban incident was no more inflammatory than the other two uncharged acts that were introduced at trial—the San Mateo carjacking of the Mercedes, where appellant brandished a weapon but did not discharge it, and the high speed chase, where appellant threw a loaded gun out of the car. Moreover, the evidence was certainly no more inflammatory than the evidence of the charged offense which the trial judge at sentencing found "disclosed . . . a high degree of cruelty, viciousness and callousness." Here, as in *Millwee,* no abuse of discretion occurred.

B. Ineffective Assistance of Counsel

Appellant argues that he was prejudiced by his counsel's ineffective assistance because at least two jurors might have seen him outside the courtroom while he was being transported in handcuffs, and defense counsel failed to request a curative instruction that would have informed the jury that the physical restraints had no bearing on appellant's guilt.

We first note that the appellate record contains no direct proof, such as an affidavit or testimony, that any juror actually saw appellant in handcuffs. The record contains only defense counsel's report, after the jury had retired to deliberate, that "[w]hile [appellant] was being transported to the other side of the courthouse, I think at least two jurors saw him . . . in handcuffs."

There was no admonition given to the jury regarding the handcuffs; such as CALJIC No. 1.04, which would have informed the jury that it must not consider the physical restraints for any purpose. Indeed, defense counsel declined such an instruction and instead requested a mistrial, which was immediately denied. Appellant argues his counsel's handling of the matter constituted ineffective assistance of counsel because "rather than request a remedy that was reasonable under the circumstances, an instruction, he requested a remedy that was unreasonable and not likely to be considered, a mistrial."

In order to successfully claim ineffective assistance of counsel, appellant must prove two components: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

The first prong of the *Strickland* standard is met only "if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions. [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 442 (*Lucas*); *People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10 [on a silent record, a claim of ineffective assistance succeeds only when "there simply could be no satisfactory explanation" for counsel's action].)

Appellant has failed to prove there was no "rational tactical purpose" for defense counsel's decision to forgo a curative instruction. (*Lucas, supra,* 12 Cal.4th at p. 442.)

Defense counsel could have reasonably concluded that an isolated incident in which a few jurors *might* have seen appellant in handcuffs was not worth bringing the incident to the entire jury's attention given the risks inherent in doing so. Admonishing the entire jury might have "invite[d] initial attention to the restraints and thus create[d] prejudice which would otherwise be avoided." (*People v. Duran* (1976) 16 Cal.3d 282, 292, fn. omitted (*Duran*).)

Even if defense counsel improperly failed to request a jury instruction regarding some of the jurors' brief observation of appellant in handcuffs, appellant has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.)

Our Supreme Court has repeatedly held that if jurors happen to observe a handcuffed defendant during transportation to and from the courtroom, prejudice is not likely to arise. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 584 ["Prejudicial error does not occur simply because the defendant 'was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen.'. . ."; *Duran, supra,* 16 Cal.3d at p. 287, fn. 2 ["Such brief observations have generally been recognized as not constituting prejudicial error. . . ."]; *People v. Hill* (1998) 17 Cal.4th 800, 841, fn. 7 [transportation of prisoner in shackles outside the courtroom and not in the jury's presence is not prejudicial]; *People v. Cunningham* (2001) 25 Cal.4th 926, 988 ["[b]rief glimpses of a defendant in restraints have not been deemed prejudicial"].) "The customary practice of utilizing physical restraints while transporting a prisoner from place to place, e.g., from jail to courtroom and back, is a matter of common knowledge and generally acknowledged as acceptable for the protection of both the public and defendant." (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141.)

Therefore, we find it is not reasonably probable that a juror's brief glimpse of appellant in handcuffs "unfair[ly] tipped the scales on this issue," as appellant claims.

Accordingly, appellant has failed to establish either of the two prongs of a claim for ineffective assistance of counsel under *Strickland*, *supra*, 466 U.S. at page 687.

C. Restitution Order

Appellant next claims that because he "was not afforded a reasonable opportunity to be heard on the issue of restitution, the issue of restitution must be remanded for further hearing." We review a restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) The abuse of discretion standard " 'asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citations].' [Citation.]" (*Ibid.*)

The probation report, which was filed with the court on June 28, 2008, the day appellant was sentenced, noted that "[a] restitution claim through Victim/Witness has been submitted in the amount of $46,000, therefore restitution in the amount of $46,000 is respectfully recommended." This amount was not broken down into categories of loss nor was there any documentation provided explaining the requested amount. At the sentencing hearing, the court indicated its intention "to award the amount to be paid to the Victim Compensation Board . . . ."

When defense counsel was invited to speak, he objected to the $46,000 restitution award for the following reasons: "I was handed this morning in court and I notice that was in the sentencing memorandum as well, that there was a claim of $46,000 from the Victim Restitution fund. [¶] I have not received any breakdown on where the money was spent. I can't agree and accept that that's an actual amount that Mr. Curry is liable for at this point. [¶] I believe he has a right to a restitution hearing on it before the Court orders that. [¶] I just haven't been provided with enough documentation at this point to feel comfortable of [*sic*] submitting on that issue. [¶] So I would object to that and would request that restitution matter be left open for the Court."

The prosecutor objected to any further hearing on the requested $46,000 in restitution, indicating that the amount is "due and payable now," and "if [defense counsel] has anything to rebut it he may, but I think that needs to be presented at this

time." After imposing sentence, the trial court ordered "actual restitution in the amount of $46,000 with the amount to be paid to the Victim Compensation Board."

Appellant claims that he was not given enough information upon which to assess the reasonableness of the restitution claim, arguing that the "court clearly abused its discretion when it denied appellant's request for a hearing on the amount of restitution." In response, respondent claims that "[b]ecause the amount paid by the Victim Compensation fund is presumed to be a valid expense under the statutory scheme, appellant's claim that he had to have a detailed breakdown of expenses is without merit."

In evaluating the parties' contentions, we first set out the statutory language. In this case, because California's Victim Compensation Board had already reimbursed the victim for $46,000 in expenses related to the crime, the court's award of restitution was governed by section 1202.4, subdivision (f)(4)(A). That section provides: "If, as a result of the defendant's conduct, the Restitution Fund has provided assistance to or on behalf of a victim . . . , the amount of assistance provided *shall be presumed to be a direct result of the defendant's criminal conduct* and shall be included in the amount of the restitution ordered." (§ 1202.4, subd . (f)(4)(A), italics added.) "The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for . . . wage or support losses . . . . Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement." (§ 1202.4, subd. (f)(4)(B).) "If the defendant *offers evidence to rebut the presumption* . . . , the court may release additional information contained in the records of the board to the defendant only after reviewing that information in camera and finding that the information is necessary for the defendant to dispute the amount of the restitution order." (§ 1202.4, subd. (f)(4)(C), italics added.)

First, it is well established that in the context of a restitution hearing, which is essentially a civil proceeding conducted in a criminal court, a defendant's due process rights are severely limited. (See, e.g., *People v. Harvest* (2000) 84 Cal.App.4th 641, 647-650.) Here, appellant was entitled to nothing more than notice of the amount of the restitution claims and an opportunity to challenge the figures; and he certainly had both those things. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86.)

Secondly, under section 1202.4, subdivision (f)(4)(C), in the event appellant believed the restitution request was unsupported, he was entitled to offer evidence to rebut the presumption that the victim's expenses were related to his crime. Had he done so, the court was empowered to release additional information in order to support the restitution claim. (§ 1202.4, subd. (f)(4)(C).) Other than asking for a hearing, defense counsel presented no evidence or argument to refute the presumption that the amount paid to the victim by the Victim Compensation Board was the direct result of his criminal conduct. Nor did he claim that the restitution amount was out of proportion to the gravity of his offense.

Clearly, undermining the need for a hearing to substantiate the $46,000 awarded is the fact that the restitution amount appears quite nominal given the pecuniary injuries the victim has suffered as a result of appellant's crime.[4] "Given defendant's failure to offer any evidence to challenge any of the amounts presented, the trial court did not abuse its discretion in awarding those amounts." (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048.)

---

[4] The probation report notes that at the time of the crime, Synada "was working full-time and attending San Francisco State University, majoring in prelaw and psychology." As a result of appellant's crime, Synada "has suffered life changing injuries that require her to reside in her parents' home and have a caretaker full-time. Her injuries include, but are not limited to, the loss of an eye and one prosthetic eye. Synada is permanently blind and has lost feeling in her right side. After years of physical therapy, she has had to learn to walk again, which she does with a severe limp and her life is digressed [*sic*] to taking small walks with her caretaker and several naps within the day."

IV.

DISPOSITION

The judgment is affirmed.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
SEPULVEDA, J.